

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 103

Claims 65-76 and 78-81 are rejected under 35 U.S.C. 103(a) as being unpatentable over Harder, 6,932,329, in view of Roth, 1,772,159.

Regarding claim 65, Harder discloses, in Figures 1 and 2, a plug fastener comprising a first hemispheroidal portion **A1** (see marked-up attachment provided on the Office action mailed on September 22, 2006) and a second hemispheroidal portion **A2** opposed to the first hemispheroidal portion **A1**. Each hemispheroidal portion **A1,A2** comprises a mating surface **33,34** respectively truncating the hemispheroidal portions **A1,A2**. The mating surface **33,34** defines a mating plane parallel to the plane of opposition. The mating planes of the first and second hemispheroidal portions **A1,A2** are opposite from each other across the plane of opposition. Ridges **37-40** extend outwardly from the respective hemispheroidal portions between the mating surfaces **33,34** and the plane of opposition. An aperture **41** is defined within and extending through the first and second hemispheroidal portions **A1,A2**. The aperture **41** has a first countersink **42** defined within an opening **A7** in the first mating surface **33**. The

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aperture **41** has a screw **24** disposed in the aperture **41**. However, Harder fails to disclose the first hemispheroidal portion **A1** being symmetrical to the second hemispheroidal portion **A2** about their plane of opposition; and the aperture **41** having a second countersink **A6** defined within an opening **A8** in the second mating surface **34**.

Roth teaches, in Figure 2 or Figure 6, a first hemispheroidal portion being symmetrical to a second hemispheroidal portion about their plane of opposition to allow a plug fastener **23a** to be inserted into a baluster **22a** from either direction of the plug fastener. Therefore, as taught by Roth, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the first hemispheroidal portion symmetrical to the second hemispheroidal portion to allow the plug fastener to be inserted into the baluster **21** in Harder from either end of the plug fastener. With respect to the aperture having a second countersink, it should be noted that placing a second countersink would have been obvious since the plug fastener would have been made symmetrical so that the head of the screw can be flushed with either mating surface **33,34**.

Regarding claim 66, the ridges **37-40** are deformable ridges.

Regarding claim 67, one of the mating surfaces **33,34** can be adapted to be affixed to a flat surface of a railing.

Regarding claim 68, the plug fastener can be adapted to be affixed to be affixed to be received within a baluster to be attached to the railing.

Regarding claim 69, the ridges **37-40** are deformable ridges and have sufficient resiliency.

Regarding claim 70, the plug fastener can be adapted to be hidden from view after the baluster is attached to the railing.

Regarding claim 71, a head of the screw **24** is substantially tapered.

Regarding claim 72, given the modification, the head of the screw **24** is disposed within the first countersink **42** or the second countersink **42**.

Regarding claim 73, given the modification, the ridges on the first hemispheroidal portion would have been directed towards the ridges on the second hemispheroidal portion since the plug fastener is symmetrical.

Regarding claim 74, a profile view of the ridges **37-40** has a substantially triangular shape.

Regarding claim 75, the plug fastener is non-metallic.

Regarding claim 76, the plug fastener comprises a material selected from the group consisting of plastic, nylon, polyvinyl chloride, and polyurethane.

Regarding claim 78, given the modification, the ridges **437-40** would have outwardly extended from the exterior surfaces of the hemispheroidal portions to define a substantially spherical shape.

Regarding claim 79, given the modification, the first and second hemispheroidal portions define a substantially spherical shape (see also column 5, lines 32-33, in Harder).

Regarding claim 80, the aperture **41** is substantially cylindrical between the countersinks **42**.

Regarding claim 81, the aperture **41** is substantially perpendicular with respect to the pane of opposition.

Response to Arguments

Applicants' arguments filed February 22, 2008 have been fully considered but they are not persuasive.

Applicants argue that nothing is provided that identifies the reason why one skilled in the art would modify Harder's fastener in this specific manner. In response, it should be first noted that Roth's drawing is a showing of making something symmetrical. The reference itself does not have to literally suggest the reason. One skilled in the art can perceive Roth's fastener to be symmetrical and therefore one can conclude that a fastener can be made reversible. Note that Roth does not show the opening being short or for that matter that the fastener cannot be inserted from either pole. This would be true if the fastener is an unsymmetrical fastener. Applicants further question what is the suggestion or motivation that would give one skilled in the art the reason to modify Harder's fastener do this. In response, it should be noted that the rejection points out the suggestion. The suggestion is to make something reversible by mere symmetry as Roth has done. Accordingly, it is beneficial to combine the references since the combined teachings provide a predictable result and a benefit.

Applicants argue that hindsight is being used to combine the references. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper.

See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). It should be noted that this knowledge is provided by Roth since Roth teaches symmetry and reversibility. This is the reason why the references were combined. Applicant argues that nothing is provided that identifies the reason why one skilled in the art would modify Harder's fastener. In response, it should be noted that Roth is provided and the drawings of Roth clearly identify symmetry. This is sufficient to establish obviousness by mere interpretation of the drawings.

Applicants further argue that Roth does not teach or suggest regarding the advantage of being able to mount a symmetrical fastener to a rail in either direction. In response, it should be noted that the rejected claims are not directed to a method of assembly and therefore the argument is not commensurate with the scope of the claim. The fact Roth does not provide literal support or is silent about the fastener being mounted in either direction does not rule out that this cannot be done. In fact, any symmetrical fastener inherently has the ability to be mounted in either direction. One looking at Roth alone can come to that conclusion of inherency, which is the basis for the obviousness rejection.

Applicants further argue that Harder provides nothing to suggest the desirability of having a symmetrical, spherical fastener with openings and countersinks on both ends. In response, the examiner acknowledges this response; however, one cannot show nonobviousness by attacking references individually where the rejections are

based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Further, Harder does not indicate that the references cannot be combined either or that his fastener cannot be improved upon by other references. The fact that Harder does not show the fastener mounted in either direction does exclude the fact that Roth teaches a symmetrical fastener that can be mounted in either direction. One can see that when the two references are combined, the result would be predictable. Harder will contain a symmetrical configuration from the teaching found in Roth.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 571-272-7083. The examiner can normally be reached from 9:30AM-6:00PM. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached at 571-272-7087.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/E. G./

Examiner, Art Unit 3679

June 14, 2008

/Daniel P. Stodola/
Supervisory Patent Examiner, Art Unit 3679